

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

NORTHWEST PIPE COMPANY,

09-CV-1126-PK

Plaintiff,

ORDER

v.

RLI INSURANCE COMPANY and
EMPLOYERS INSURANCE OF WAUSAU

Defendants.

MICHAEL B. MERCHANT

Black Helterline, LLP
1900 Fox Tower
805 S.W. Broadway
Portland, OR 97205-3359
(503) 224-5560

Attorneys for Plaintiff

BRUCE C. HAMLIN

TIMOTHY J. FRANSEN

Martin, Bischoff, Templeton, Langslet & Hoffman LLP
888 S.W. Fifth Avenue
900 Pioneer Tower
Portland, OR 97204-2023
(503) 382-4204

CHRISTOPHER W. TOMPKINS

Betts Patterson & Mines PS
701 Pike Street, Suite 1400
Seattle, WA 98101
(206) 292-9988

Attorneys for Defendant RLI Insurance Company

WILLIAM G. EARLE

HANNE EASTWOOD

Davis Rothwell Earle & Xochihua, PC
111 S.W. Fifth Ave,
Suite 2700
Portland, OR 97204-3650
(503) 222-4422

BRYAN M BARBER

Barber Law Group
101 California Street
Suite 810
San Francisco, CA 94111-5802
415-273-2930

Attorneys for Defendant Employers Insurance of Wausau

BROWN, Judge.

Magistrate Judge Paul Papak issued Findings and Recommendation (#54) on April 27, 2010, in which he recommends the Court grant the Motion (#23) for Partial Summary Judgment of Defendant Employers Insurance of Wausau, grant the Motion (#28) for Summary Judgment of Defendant RLI Insurance Company, deny the Motion (#32) for Summary Judgment (Phase I - Duty to Defend) of Plaintiff Northwest Pipe Company, dismiss Plaintiff's claims against RLI and Wausau, and declare Wausau does not have a duty to defend or to indemnify NW Pipe under the 1985-86 insurance policy. Plaintiff filed timely objections to the Findings and

Recommendation. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

**Portions of the Findings and Recommendation to which
Plaintiff does not object.**

Plaintiff does not object to those portions of the Findings and Recommendation in which the Magistrate Judge recommends this Court grant Wausau's Motion for Partial Summary Judgment, deny the portion of Plaintiff's Motion for Partial Summary Judgment as to Wausau's duty to defend, dismiss Plaintiff's claims against Wausau, and declare Wausau does not have a duty to defend or to indemnify NW Pipe under the 1985-86 insurance policy.

Because Plaintiff does not object to these portions of the Magistrate Judge's Findings and Recommendation, this Court is relieved of its obligation to review the record *de novo*. See *Britt v. Simi Valley Unified School Dist.*, 708 F.2d 452, 454 (9th Cir. 1983)(rev'd on other grounds). See also *Lorin Corp. v. Goto & Co.*, 700 F.2d 1202, 1206 (8th Cir. 1983). Having reviewed the legal principles *de novo*, the Court does not find any error.

Accordingly, the Court adopts these portions of the Magistrate Judge's Findings and Recommendation.

**Portions of the Findings and Recommendation to which
Plaintiff does object.**

Plaintiff objects to those portions of the Findings and

Recommendation in which the Magistrate Judge recommends the Court grant RLI's Motion for Summary Judgment as to RLI's duty to defend, deny Plaintiff's Motion for Summary Judgment as to RLI's duty to defend, and dismiss Plaintiff's claims against RLI.

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1). *See also United States v. Bernhardt*, 840 F.2d 1441, 1444 (9th Cir. 1988); *McDonnell Douglas Corp. v. Commodore Business Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

I. Policy Language

RLI's insurance policy issued to Plaintiff provides in pertinent part:

I. COVERAGE

The Company hereby agrees . . . to indemnify
[Plaintiff] . . .

for damages, direct or consequential and expenses,
all as more fully defined by the term "ultimate
net loss" on account of:

- (I) Personal injuries, including death at
any time resulting therefrom,
- (ii) Property Damage,
- (iii) Advertising liability,

caused by or arising out of each occurrence.

* * *

II. LIMIT OF LIABILITY

The Company shall only be liable for the ultimate net loss the excess of . . .

- (a) the limits of the underlying insurance as set out in the schedule in respect of each occurrence covered by said underlying insurances.

* * *

III. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS

With respect to any occurrence not covered by the underlying policies listed in the Schedule of Underlying Insurances hereof or any other underlying insurance collectible by [Plaintiff], but covered by the terms and conditions of this policy . . . [RLI] shall

- (a) defend any suit against [Plaintiff] alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent.

* * *

6. ULTIMATE NET LOSS

The term "Ultimate Net Loss" shall mean the total sum which [Plaintiff] . . . become[s] obligated to pay by reason of . . . property damage . . . and shall also include . . . expenses for . . . litigation . . . of claims and suits which are paid as a consequence of any occurrence covered hereunder.

* * *

L. OTHER INSURANCE

If other valid and collectible insurance with any other insurer is available to [Plaintiff] covering a loss also covered by this policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in

excess of and shall not contribute with such other insurance.

Notice of Removal, Ex. A at 13, 15, 19.

II. Analysis

As noted, Plaintiff objects to those portion of the Findings and Recommendation in which the Magistrate Judge recommends this Court grant RLI's Motion for Summary Judgment, deny Plaintiff's Motion for Partial Summary Judgment as to the issue of RLI's duty to defend, and dismiss Plaintiff's claims against RLI. Specifically, Plaintiff objects to the Magistrate Judge's findings and conclusion that "horizontal exhaustion" applies to RLI's duty to defend (*i.e.*, that RLI's duty to defend is not "triggered" until "all [of Plaintiff's] primary insurance coverage is exhausted") and that RLI's duty to defend has not been "triggered" because other insurers are defending NW Pipe completely as to all of the claims against NW Pipe.

A. Insurance Contract Interpretation

Under Oregon law, courts

interpret insurance policy provisions according to the analytical framework set out in *Hoffman Construction Co.* [Courts] first determine whether the policy defined the term at issue and, if it did not, [courts] look to the plain meaning of the term. *American Hardware Ins. Group*, 167 Or. App. at 248, 2 P.3d 413. If [the court] determine[s] that there are two or more plausible interpretations of the term, then we consider whether those interpretations "withstand scrutiny, *i.e.*, continue[] to be reasonable, after the interpretations are examined in the light of, among other things, the particular context in

which that term is used in the policy and the broader context of the policy as a whole." *Hoffman Construction Co.*, 313 Or. at 470, 836 P.2d 703. Only if more than one interpretation remains reasonable after such an examination will we conclude that the policy provision is ambiguous. *Id.* If the provision is ambiguous, we construe it against the insurer as its drafter. *Id.* at 470-71, 836 P.2d 703.

Clinical Research Inst. of S. Or., P.C. v. Kemper Ins. Co., 191 Or. App. 595, 599-600 (2004).

Under Oregon law, courts "'evaluate a duty to defend claim by examining two documents: the complaint and the insurance policy.'" *Certain Underwriters at Lloyd's London and Excess Ins. Co., Ltd. v. Mass. Bonding and Ins. Co.*, 235 Or. App. 99, 116 (2010)(quoting *Am. Hardware Ins. Group v. West One Auto.*, 167 Or. App. 244, 247 (2000)).

B. Exhaustion Requirement

The parties dispute the meaning of the phrase "any other underlying insurance" set out in the duty-to-defend portion of RLI's policy. Plaintiff contends that provision means RLI has a duty to defend under its umbrella policy issued to Plaintiff when the underlying coverage is exhausted for the same effective period as RLI's policy. RLI contends that provision means RLI has a duty to defend Plaintiff only after Plaintiff's underlying coverage for all possible periods has been exhausted. The Court concludes there are two plausible interpretations of the provision at issue, and, therefore, the Court must consider

whether those interpretations "withstand scrutiny, *i.e.*, continue[] to be reasonable, after the interpretations are examined in the light of, among other things, the particular context in which that term is used in the policy and the broader context of the policy as a whole." *Clinical Research Inst. of S. Or.*, 191 Or. App. at 600 (quotation omitted).

It is undisputed that Oregon courts have not analyzed whether an umbrella insurer's duty to defend is triggered only after all of an insured's primary insurance is exhausted. The parties, therefore, rely on California cases.¹

The Magistrate Judge relied on *California Insurance Company v. Oregon Insurance Guaranty Association*, No. 01-CV-514-HA, 2005 WL 627624 (D. Or. Mar. 17, 2005), when he concluded the policy at issue required horizontal exhaustion of all underlying policies before RLI's duty to defend was triggered. *California Insurance Company*, however, addressed whether an insured was required to exhaust underlying insurance before the excess or umbrella insurers' duty to indemnify was triggered rather than whether an insured was required to exhaust underlying insurance before the umbrella insurer's duty to defend was triggered.

Plaintiff relies on *Legacy Vulcan Corporation v. Transport Insurance Company*, No. B215713, 2010 WL 2333075 (Cal.

¹ The parties do not dispute, and the Court agrees, that Oregon and California apply the same rules of insurance contract interpretation.

App. 2 Dist. June 11, 2010), to support its position. In *Legacy* the defendant issued liability insurance policies to the plaintiff for several years including a policy effective from January 1, 1981, through January 1, 1982. The 1981-82 policy provided in pertinent part:

The Company will indemnify the Insured for ultimate net loss in excess of the retained limit hereinafter stated which the Insured shall become legally obligated to pay as damages because of

- A. personal injury or
- B. property damage or
- C. advertising injury

to which this insurance applies, caused by an occurrence, and

(1) With respect to any personal injury, property damage or advertising injury not within the terms of the coverage of underlying insurance but within the terms of coverage of this insurance; or

(2) If limits of liability of the underlying insurance are exhausted because of personal injury, property damage or advertising injury during the period of this policy.²

The Company will

- (a) have the right and duty to defend any suit against the Insured seeking damages on account of such . . . property damage . . . even if any of the allegations of the suit are groundless, false or fraudulent.

Id., at *2 (emphasis in original). In addition, the policy

² The court refers to these provisions as clause (1) and clause (2) throughout its opinion.

provided in a separate provision that the defendant's limit of liability was the

ultimate net loss in excess of the Insured's retained limit defined as the greater of:

(a) an amount equal to the limits of liability indicated beside the underlying insurance listed in Schedule A hereof, plus the applicable limits of any other underlying insurance collectible by the Insured; or

(b) the amount specified in Item 3. of the Limits of Liability section of the declarations because of . . . property damage . . . not within the terms of the coverage of the underlying insurance listed in Schedule A.

Id., at *2-3 (emphasis in original). The policy defined "ultimate net loss" as "the amount actually paid or payable for [the plaintiff's] liability" and did not contain a definition for the term "underlying insurance," but it did include a "Schedule of Underlying Insurance" that listed several insurance policies and stated the limits of liability for each policy. *Id.*, at *3. Finally, the policy provided

Other insurance

If collectible insurance with any insurer is available to the Insured covering a loss also covered hereunder, the insurance hereunder shall be in excess of, and not contribute with, such other insurance provided, however, this does not apply to insurance which is written as excess insurance over the Company's limit of liability provided in this policy.

Id. On appeal the plaintiff contended, among other things, that

(1) the duty to defend in clause (1) relates to

the policy's umbrella coverage and extends to suits that are potentially covered under [the defendant's] policy, so [the plaintiff] need not show that a suit is actually covered in order to trigger a duty to defend; . . . and (3) the duty to defend in clause (1) does not depend on the exhaustion of any underlying insurance, so principles of horizontal exhaustion are inapplicable.

Id., at *6. The court distinguished primary, excess, and umbrella coverage as follows:

Primary insurance provides coverage immediately upon the occurrence of a loss or an event giving rise to liability, while excess insurance provides coverage only upon the exhaustion of specified primary insurance. . . . Umbrella insurance provides coverage for claims that are not covered by the underlying primary insurance. An umbrella insurer "drops down" to provide primary coverage in those circumstances. Thus, a policy that provides both excess and umbrella insurance provides both excess and primary coverage.

Id. (citations omitted). The court concluded the policy at issue contained both excess and umbrella insurance, and, therefore, it provided both excess and primary coverage. *Id.*, at *7. The court noted the language of clause (1) provides the defendant had a duty to defend

any suit against [the plaintiff] seeking damages for . . . "property damage not within the terms of the coverage of underlying insurance but within the terms of coverage of this insurance." Alternatively, the [policy] provided, in clause (2), that in the event the conditions specified in clause (1) did not exist, then [the defendant's] defense duty would not arise until "the limits of liability of the underlying insurance are exhausted because of personal injury, property damage or advertising injury during the period of this policy."

Id. (emphasis in original). In summary,

if clause (1) did not apply to a particular claim, then, under clause (2), [the defendant's] duty to defend with respect to that claim would not be triggered until the exhaustion of the underlying insurance. If clause (1) did apply to a particular claim, however, then [the defendant's] defense duty would be triggered and clause (2) [and its exhaustion requirement] would have no application with respect to that claim.

Id.

The Court agrees with the general reasoning of *Legacy*. As noted, RLI's policy as to the duty to defend provides:

With respect to any occurrence not covered by the underlying policies listed in the Schedule of Underlying Insurances hereof or any other underlying insurance collectible by [Plaintiff], but covered by the terms and conditions of this policy . . . [RLI] shall

- (a) defend any suit against [Plaintiff] alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent.

Unlike in *Legacy*, the duty-to-defend provision here does not require exhaustion nor is there any provision the Court could construe as an excess-insurance provision requiring exhaustion before the duty to defend is triggered. Although the RLI policy sets out an exhaustion provision in the section of the policy relating to indemnity coverage, that provision is not repeated in the section of the policy setting out RLI's duty to defend. When construing instruments, the court is "to ascertain and declare what is, in terms or in substance, contained therein, not to

insert what has been omitted, or to omit what has been inserted." Or. Rev. Stat. § 42.230. Accordingly, the Court declines to import the exhaustion requirement into the duty-to-defend provision.

C. Duty to Defend

As noted, courts in Oregon "evaluate a duty to defend claim by examining two documents: the complaint and the insurance policy." *Certain Underwriters at Lloyd's*, 235 Or. App. at 116 (quotation omitted). "In the absence of any compelling evidence of no coverage, the insurer owes a duty to defend if the injured claimant can recover under the allegations of the complaint upon any basis for which the insurer affords coverage." *Clinical Research Inst. of S. Or.*, 191 Or. App. at 599-600 (2004)(quotation omitted).

"Even if the complaint alleges some conduct outside the coverage of the policy, the insurer may still have a duty to defend if certain allegations of the complaint, without amendment, could impose liability for conduct covered by the policy. . . . Any ambiguity in the complaint with respect to whether the allegations could be covered is resolved in favor of the insured."

Certain Underwriters at Lloyd's, 235 Or. App. at 116 (quoting *Ledford v. Gutoski*, 319 Or. 397, 399-400 (1994)). Accordingly, an insurer has a duty to defend if any allegations in the complaint could possibly trigger the duty to indemnify under the policy.

As noted, the policy at issue provides RLI has a duty

to defend Plaintiff for "any occurrence not covered by the underlying policies listed in the Schedule of Underlying Insurances hereof or any other underlying insurance collectible by [Plaintiff], but covered by the terms and conditions of this policy." Accordingly, under the plain language of the policy, RLI has a duty to defend Plaintiff when (1) the claim involves a covered "occurrence" as defined in the policy, (2) there is not any policy listed in the Schedule of Underlying Insurance that provides indemnity for the covered occurrence, and (3) there is not any "other underlying insurance collectable by [Plaintiff]."

The parties do not dispute for purposes of these Motions that the claim at issue involves a covered occurrence as that term is defined in the RLI policy. In addition, it is undisputed that the Schedule of Underlying Insurances referred to in the duty-to-defend provision lists only the Wausau policy, which the Court has concluded does not provide Plaintiff with coverage due to the "absolute pollution exclusion" in the Wausau policy. Accordingly, the first two conditions triggering RLI's duty to defend have been satisfied.

The parties, however, dispute whether there is "other underlying insurance collectable by [Plaintiff]," and, as a result, RLI does not have a duty to defend. As noted, the policy does not define the phrase "underlying insurance collectible by [Plaintiff]." RLI contends Plaintiff's proposed interpretation

that RLI has a duty to defend Plaintiff when the underlying coverage is exhausted for the same effective period as RLI's policy strains the plain meaning of the policy language and renders the phrase "effectively meaningless" because "underlying insurance covering the same effective period as the RLI policy would in the usual case be expected to appear on the policy's schedule of underlying insurance." According to RLI, therefore, horizontal exhaustion of all primary insurance triggers RLI's duty to defend as well as its duty to indemnify.

As noted, when interpreting an insurance policy, the Court must "ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." See Or. Rev. Stat. § 42.230. The Court also must attempt to construe the phrase "any other underlying insurance" to give it meaning within the context of the policy as a whole. See *Gonzales v. Farmers Ins. Co. of Or.*, 345 Or. 382, 387 (2008) ("We also consider the particular context in which that term is used in the policy and the broader context of the policy as a whole.").

RLI's policy defines "other insurance" as "other valid and collectible insurance with any other carriers . . . available to [Plaintiff] covering a loss also covered by" RLI's policy. In turn, RLI's policy sets out losses covered by its policy as "property damage . . . caused by or arising out of each

occurrence." RLI's policy defines an "occurrence" in pertinent part as

an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in . . . property damage . . . *during the policy period.*

Notice of Removal, Ex. A at 15 (emphasis added). Thus, the definition of a covered occurrence includes the temporal limitation to occurrences during the policy period. Accordingly, the Court concludes the phrase "any other underlying insurance" must be interpreted within the context of RLI's policy as a whole to encompass only underlying insurance covering losses that occurred during RLI's policy period.

As Plaintiff points out, Plaintiff had primary indemnity coverage only through Wausau during the effective period of the RLI policy. The Court has concluded Wausau does not have any duty to defend or to indemnify Plaintiff due to the absolute pollution exclusion in the Wausau policy. In addition, RLI has not established any other insurer or policy has a duty to indemnify Plaintiff for the period at issue or that the property damage did not occur during the period at issue, and, therefore, the conditions triggering RLI's duty to defend have been met.

The Court notes RLI also contends it does not have any duty to defend Plaintiff under its policy because other insurers also are defending Plaintiff in connection with their insurance

policies for the period at issue. RLI, however, confuses the duty to defend with the duty to indemnify. RLI's policy clearly defines its duty to defend in terms of an occurrence covered by underlying insurance. An occurrence is defined in terms of an event triggering indemnification rather than defense. As Plaintiff notes, an insurer under Oregon law has a duty to defend all claims if any claim is covered. *See, e.g., Timberline Equip. Co., Inc. v. St. Paul First & Marine Ins. Co.*, 281 Or. 639, 645 (1978)("If the complaint contains some allegations of conduct or damage excluded from the policy but has other allegations which would fall within the policy coverage, the insurer has a duty to defend. The insurer is liable for the total defense costs. quotation omitted).*" See also Delta Sand & Gravel Co v. Gen. Ins. Co.*, 111 Or. App. 347, 350 (1992)("a duty to defend arises whenever the allegations of the complaint filed against the insured show that there is a possibility that the policy provides coverage for the claim made."). Accordingly, the fact that other insurers are fully defending Plaintiff does not establish the policies issued by those insurers provide underlying indemnity coverage for Plaintiff for the occurrence indemnified by RLI's policy. Whether other insurers also defend this action is not relevant to RLI's duty to defend under the terms of its policy because RLI has not established either that Wausau or any other underlying insurer must indemnify Plaintiff for the alleged

property damage during RLI's policy period or that the alleged damage did not occur within the period of RLI's policy.

The Court concludes on this record that RLI has a duty to defend Plaintiff in this action under the terms of its policy unless or until RLI establishes the property damage at issue was not "caused by or arising out of [an] occurrence" during the relevant policy period. Accordingly, the Court does not adopt that portion of the Findings and Recommendation in which the Magistrate Judge recommends this Court grant Defendant RLI's Motion for Summary Judgment as to RLI's duty to defend, deny Plaintiff's Motion for Partial Summary Judgment as to RLI's duty to defend, and dismiss Plaintiff's claims against RLI.

CONCLUSION

The Court **ADOPTS** that portion of Magistrate Judge Papak's Findings and Recommendation (#54) in which he recommends the Court grant Defendant Wausau's Motion (#23) for Partial Summary Judgment, deny the portion of Plaintiff's Motion (#32) for Partial Summary Judgment as to Defendant Wausau's duty to defend, declare Wausau does not have a duty to defend or to indemnify Plaintiff under the 1985-86 insurance policy, and dismiss all of Plaintiff's claims against Wausau.

The Court **DOES NOT ADOPT** that portion of the Findings and Recommendation in which the Magistrate Judge recommends the Court

grant Defendant RLI's Motion (#28) for Summary Judgment as to RLI's duty to defend, deny the portion of Plaintiff's Motion (#32) for Partial Summary Judgment as to RLI's duty to defend, and dismiss Plaintiff's claims against RLI.

In summary, the Court **GRANTS** Defendant Wausau's Motion (#23) for Partial Summary Judgment, **DISMISSES** all of Plaintiff's claims against Wausau, **DENIES** RLI's Motion (#28) for Summary Judgment as to RLI's duty to defend, **GRANTS** Plaintiff's Motion (#32) for Partial Summary Judgment as to RLI's duty to defend, and **DENIES** Plaintiff's Motion (#32) for Partial Summary Judgment as to Wausau's duty to defend.

IT IS SO ORDERED.

DATED this 11th day of August, 2010.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge